FILE COPY

Office Supreme Court, U.S.
FILED
JAN 16 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 617

PETER PAUL, INC., *et al.*,

Petitioners,

—against—

REDERI A/B PULP,

—and against—

REDERI A/B JAMAICA, D/S A/S EIKLAND and SALAMIS A.S.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES McKOWN, JR.,
Attorney for Respondents,
80 Broad Street,
New York 4, N. Y.

WHARTON POOR,
CHARLES S. HAIGHT,
R. GLENN BAUER,
Counsel.

TABLE OF CONTENTS

	PAGE
PROCEEDINGS BELOW	1
(1) CIRCUMSTANCES OF THE LOSS	3
(2) PRIOR HISTORY OF THE "CHRISTER SALEN"	4
FIRST POINT	
The only questions presented in this case are of fact which were decided in respondents' favor in the District Court and affirmed by the Court of Appeals	6
A. There was never any exterior damage to the sheer strake	10
B. The asserted obligation to install crack arresters	13
SECOND POINT	
The cases cited by the petitioners are all distinguishable	17
LAST POINT	
The petition for certiorari should be denied	22

TABLE OF CASES AND OTHER AUTHORITIES:

Cases:

Angliss v. *P. & O. S. N. Co.*, L. R. [1927] 2 K. B. 456	7
Balfour Guthrie v. *Amer. West Af. Line*, 136 F. 2d 320	7

PAGE

Cabo Hatteras, The, 5 F. Supp. 725, 736 15
Chicago etc. Transit Co. v. *Moore*, 259 Fed. 490 ..... 9, 10
Commercial Molasses v. *N. Y. Tank Barge Co.*, 314 U. S. 104 18
Compania Generale v. *United States*, 49 F. 2d 700 21
Cornec v. *Balto. & Ohio R. R.*, 48 F. 2d 497 21
Coryell v. *Phipps*, 317 U. S. 406 2

Floridian, The, 83 F. 2d 949 7
Fred E. Hasler, The, 55 F. 2d 919 21

Great Atlantic & Pac. Co. v. *Lloyd Brasileiro*, 159 F. 2d 661 21

Hines v. *Butler*, 278 Fed. 877 21
Hudson River Shipyards v. *Metropolitan Sand & Gravel Co.*, 104 F. 2d 167 18

Indrani, The, 177 Fed. 914 12
Isis, The, 290 U. S. 333 17

Just v. *Chambers*, 312 U. S. 383 2

Louis-Dreyfus v. *Paterson Steamships*, 67 F. 2d 331 20
Loveland v. *Bethlehem*, 33 F. 2d 655 18

McAllister v. *United States*, 348 U. S. 19 ...8, 9, 10

Nederlansche etc. v. *Mediterranean Traders*, 17 F. 2d 586 18

Oritani, The, 40 F. 2d 522, aff'd 54 F. 2d 1075 .. 19

Quarrington Court, The, 122 F. 2d 266 7

Riverstone Meat Co. v. *Lancashire Shipping Co.* [1958] 3, Weekly Law Rep., 482 16

PAGE

Silverpalm, The, 94 F. 2d 776 19

Spang Chalfant Co. v. *Dimon S. S. Corp.*, 57 F. 2d 965 15

Spencer Kellogg, In re, 52 F. 2d 129 21

Standard Oil v. *Clan Line*, L. R. [1924] A. C. 100 19

States Steamship Co. v. *U. S.*, 259 F. 2d 458, cert. denied, Jan. 12, 1959 20

Toledo, The, 30 F. Supp. 93, aff'd 122 F. 2d 255 7

Touraine, The, L. R. [1928] P. D. 58, 68 12

Vallescura, The, 293 U. S. 296 17

Virginia Carolina Chem. Co. v. *Norfolk & N. Amer. S. S. Co.*, 17 Comm. Cas. 277 15

Wildcroft, The, 201 U. S. 378 18

Statute Cited:

Title 46 U. S. Code, Sec. 1304 (1) and (2) (p) 2

Text-Book Cited:

Corpus Juris Secundum, Article on Evidence, Vol. 32, p. 1052 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 617

PETER PAUL, INC., *et al.*,

Petitioners,

—against—

REDERI A/B PULP,

—and against—

REDERI A/B JAMAICA, D/S A/S EIKLAND and SALAMIS A/S,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Proceedings Below

Petitioners are cargo underwriters, consignees, etc., suing to recover for loss or damage to cargo, shipped on board the m/s "Christer Salen", resulting from a hull fracture off the coast of Japan on February 15, 1951.

Respondent, Rederi A/B Pulp, was the owner of the "Christer Salen" and the other respondents were allegedly partners of Rederi A/B Pulp.

The District Court dismissed the libels and allowed recovery of general average.

The question involved turns on the application of Section 4 of the U. S. Carriage of Goods by Sea Act, 46 U. S. Code, Section 1304, which reads:

> "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, * * *.
>
> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—* * *
>
> (p) Latent defects not discoverable by due diligence;"

Judge McGohey made 51 detailed findings covering 14 pages (A1 to 14, attached to petition). His conclusion was that the carrier had exercised due diligence and that the loss of the fore-part of the ship was due to a latent defect not discoverable by due diligence (reported, 152 F. Supp. 410). The Court of Appeals affirmed his decision (reported 258 F. 2d 901), and petitioners' motion for a rehearing, was denied (Petit., p. 2).

The rule that concurrent findings of fact will not be reviewed applies. *Just* v. *Chambers*, 312 U. S. 383; *Coryell* v. *Phipps*, 317 U. S. 406.

The case at bar is of interest only to the parties; there are no "special and important" reasons why a writ of certiorari should be granted (Rule 19.1.b).

This case cannot be a controlling precedent as respects any other. All that was decided was the issue

of due care in the light of particular facts. There is no conflict with any decision in another circuit nor with applicable local law.

(1) Circumstances of the Loss.

On February 14, 1951, at 5:12 P. M., the "Christer Salen" left Yokohama, Japan, bound for Vancouver, B. C., as her first port of call (Fdg. 21, at p. A6).

She was well manned, well fitted and considered completely seaworthy (Resp. Appx. 136a, 164a).*

During the evening, the wind increased in violence and the ship had to be hove to on account of the storm (Appx. 164a, 165a).

In the early morning of the 15th, the deck cargo lashings on the after deck became slack on account of the violent pitching and tossing and had to be tightened by the crew. In order to do this, it was necessary to put the ship's head to the wind to prevent the crew being washed overboard (Fdg. 22, at p. A6, Appx. 9a, 165a).

The mate on watch testified that this was the heaviest weather he had ever experienced, both in strength of wind and sea (Appx. 165a).

At 4 P. M. on the 15th, when there was an abatement in the weather, the ship was proceeding at "slow" (Ex. H, p. 2).

* The printed appendices which were filed in the Court of Appeals and in this Court are numbered consecutively, commencing with 1a and they will be so referred to in this brief.

At 4:13 P. M., the master directed the chief engineer to accelerate the engines to 80% of normal full speed (Fdg. 23 at p. A7).

At about 6:45 P. M., on the 15th, a wave of unusual proportions was seen close by on the port bow (Appx. 136a, 137a). When the ship's midship section was lifted by this wave the stress initiated a crack in the upper part of the starboard sheer strake (Fdg. 29, at p. A8). The crack spread rapidly in the plating, and the ship was severed into two parts at about the middle of No. 3 hatch (Fdg. 25, at p. A7).

The forward and after part of the ship separated, and the forward part of the ship, together with all the cargo therein, was lost in the storm (Fdg. 26, at p. A26). The after part of the ship was navigated back to Yokohama with outstanding seamanship on the part of the master (Fdg. 27, at p. A7).

On arrival at Yokohama, the face of the fracture was examined by Mr. Reginald Ibison, Senior Surveyor of Lloyd's Register for Japan. Mr. Ibison had had extensive experience as a naval architect and ship surveyor, and had participated in meetings of the Admiralty Ship Welding Committee (Appx. 171a). Mr. Ibison's conclusion, which was concurred in by all of the experts, was that the fracture was due to a latent defect in the upper part of the starboard sheer strake (see infra, p. 11).

(2) Prior History of the "Christer Salen".

The "Christer Salen" was built in the Eriksberg Shipyard at Gothenburg, Sweden (Finding 12 at p.

A4), which is one of the three largest in Sweden (Appx. 174a).

She was launched in September 1944 and completed in February 1945 but because of World War II, was not put into service until June 1945 (Fdg. 12 at p. A4). Following prevalent practice, her plates were welded one to the other and attached to the frames by rivets (Fdg. 12, at p. A4).

She was classed 100-A1 by Lloyd's Register of Shipping and she remained until the casualty, out of which this litigation arose (Fdg. 13, at p. A4).

In early 1950, while trading in the Philippines, she ran ashore, resulting in serious damage to her forefoot (Fdg. 14, at p. A4), and had to be sent to Gothenburg for repairs.

At the conclusion of these repairs, certificates were issued, confirming that all damage had been repaired and that the "Christer Salen" was seaworthy (Fdg. 15 at p. A5). Lloyd's surveyor and owner's surveyor testified that they had gone over the vessel with the greatest care and could find no defect (Appx. 166a-168a).

In May 1950, the "Christer Salen" left Gothenburg (Fdg. 16, at p. A5), proceeding to the Far East where she loaded cargo for the West Coast of North America.

She then loaded a return cargo for Japanese and other Far East ports, sailing from Vancouver for Kobe on November 21, 1950 (Fdg. 17, at p. A5).

Between January 6 and 8, 1951, when at Hong Kong she was drydocked and inspected by the surveyor to Lloyd's Register, who found her hull and other parts in good condition (A5 and A23). The "Christer Salen" then called at Philippine and Japanese ports, at which cargo was loaded, sailing from Yokohama on February 14th, as previously stated.

FIRST POINT

The only questions presented in this case are of fact which were decided in respondents' favor in the District Court and affirmed by the Court of Appeals.

Commencing at Finding 35, the Findings read (p. A-9):

> "35. The fracture started at a notch in the sheer strake plate. The notch was present when the plate was put into the vessel and made her unseaworthy when she sailed from Yokohama.
>
> 36. At and prior to July 1943, when the plates subsequently incorporated in the 'Christer Salen' were rolled, the then known tests for ship's plates were not designed to, and in fact did not, disclose the existence or non-existence of notch brittleness in such steel.
>
> 37. The steel used in building the 'Christer Salen' complied with all of Lloyd's then existing requirements. At the time of the accident the vessel was classed 100-A-1.
>
> 38. The notch constituted a latent defect, which the owner could not discover by means of any known or customary test."

The findings fully establish that the fracture was due to a latent defect not discoverable by due diligence for which the carrier is not liable under the Carriage of Goods by Sea Act, *supra*, p. 2, and in the following cases it was held that there was no liability for loss or damage to cargo under such circumstances.

Balfour Guthrie & Co. v. *American West African Line*, 136 F. 2d 320, C. C. A. 2;
The Toledo, 30 F. Supp. 93, affirmed 122 F. 2d 255, C. C. A. 2;
The Quarrington Court, 122 F. 2d 266, C. C. A. 2;
The Floridian, 83 F. 2d 949, C. C. A. 2;
Angliss v. *P. & O. Steam Nav. Co.*, L. R., [1927], 2 K. B. 456.

Petitioners admit in their petition for re-hearing (p. 1) that the Court of Appeals "made a careful study of the technical problems" involved and that its opinion was a "thoughtful" one.

The petition for re-hearing further states at p. 4:

> "This Court said (at p. 2263) that whatever may have brought about the fracture 'all a shipowner need establish is that normal precautions were taken to see that a discoverable notch did not exist.' We agree that that is a fair statement of the shipowner's obligation * * *."

It is obvious from the foregoing that, by petitioners' own concession, the Court of Appeals, fully understanding the factual and legal principles applicable, nevertheless affirmed the decision of the District Court and denied the petition for re-hearing.

Petitioners claim (petition p. 6) that the finding of the District Court (No. 38, p. A9), that the notch in the sheer strake was a latent defect which could not be discovered by means of any "known or customary test", was reversed by the Court of Appeals. This, however, is an obvious error. At page A-22, the Court of Appeals said:

> "The trial Court rejected this theory [of the petitioners] in finding that the notch was a latent defect. We reach the same result as did the Court below * * *."

This was an affirmance of the District Court's finding.

The Court of Appeals then refers to the testimony of Mr. Murray and Mr. Ibison. Mr. Ibison, Lloyd's Senior Surveyor for Japan, examined the place of fracture immediately after the "Christer Salen" arrived at Yokohama (Appx. 118a). Mr. Ibison, who, of course, had the advantage of examining the place of fracture, found slag inclusions, and his testimony indicated that the slag inclusions were the initiating cause of the fracture. Mr. Murray, on the other hand, preferred the theory of a micro-crack (Appx. 49a) which, although very minute when the plate was manufactured, would continue to increase in size through the strains met with by the ship (Appx. 36a). The Court of Appeals held, with obvious correctness, that it was virtually impossible to state "with any degree of certainty" which of these two expert theories was correct.

Under the decision in *McAllister* v. *United States*, 348 U. S. 19, the findings of fact of the District Court

are not reviewable on appeal unless they are found to be "clearly erroneous", and unless the reviewing Court is left "with the definite and firm conviction that a mistake has been committed."

In the case at bar, the findings of fact of the District Court have been unanimously affirmed by the Court of Appeals, with the result, it is respectfully submitted, that they will not be reviewed by this Court.

As the findings of fact dispose of the litigation, there is no bona fide ground on which this petition for certiorari can be supported.

Also, in view of the decision in *McAllister* v. *United States, supra, "the burden of proof" on which petitioners rely is no longer of importance.*

The question for consideration by the Court of Appeals and by this Court is not whether the burden of proof has been sustained but whether the findings of the District Court were "clearly erroneous."

Even in the trial court, the burden of proof is unimportant, except when the evidence is equally balanced. If the trier of facts finds that there is a preponderance of evidence in favor of one side or the other, then questions as to the burden of proof disappear.

> Corpus Juris Sec., Article on Evidence, Volume 32, p. 1052;
> *Chicago etc. Transit Co.* v. *Moore*, 259 Fed. 490, at 494, C. C. A. 6.

To sustain the burden of proof, a showing of greater probability is all that is required.

Chicago etc. Transit Co. v. Moore, supra; McAllister v. United States, supra, 348 U. S. at p. 22.

The District Court reached its conclusions after the termination of a ten-day trial and consideration of the lengthy testimony of twelve witnesses and one hundred exhibits. Five witnesses testified in open court.

A. There was never any exterior damage to the sheer strake.

Petitioners suggest that the sheer strake might have suffered exterior damage before the ship sailed from Yokohama and that it was this supposititious exterior damage, and not the latent defect testified to by the expert witnesses, which caused the fracture and loss of the forepart of the ship.

There is not even a scintilla of evidence that the sheer strake ever suffered any exterior damage, and there is both positive and negative evidence that no such damage was sustained.

The "Christer Salen" was surveyed at Hong Kong between January 6 and 8, 1951, by the surveyor of Lloyd's Register who found her shell plating in good condition (Fdg. 18 at p. A4); this finding is emphasized in the opinion of the Court of Appeals at p. A23.

After leaving Hong Kong, the "Christer Salen" loaded in the Philippines and Japan before sailing from Yokohama on February 14th.

There is not the slightest hint in the record that any damage to the sheer strake could have been sustained between the survey at Hong Kong and February 14th, when the "Christer Salen" sailed from Yokohama.

The sheer strake was a steel plate .65 of an inch thick (T. M. p. 248) and could have been damaged only by very severe contact with a hard and heavy object.

As soon as the "Christer Salen" had returned to Yokohama, Mr. Ibison, Lloyd's Senior Surveyor for Japan, made a careful examination of the sheer strake and other parts of the hull to ascertain the cause of the fracture. He testified that he could find no evidence to support the unproved assumption of petitioners' counsel that there was a nick or break at the top of the sheer strake (Resp. Appx. 128a), and, in answer to the suggestion that the dropping of a piece of "metal cargo" might cause a sharp "V" indent in the sheer strake, testified:

> "I have never in my own experience either seen or even heard of a fracture initiating in the type of thing you are talking about now" (Appx. p. 128a).

None of the ship's officers testified that they had any knowledge of any "nick or break" in the sheer strake.

After the ship had returned to Yokohama, a Maritime Declaration required by Swedish law was held at which the master and officers of the ship testified. Counsel for petitioners read parts therefrom in his cross-examination of the ship's witnesses; in no part

thereof is there any mention of a nick or break in the sheer strake, nor is there any mention of such a nick or break in the letter which the master wrote to his owners on March 9, 1951 (Ex. GG), in which he recited the events leading up to the casualty.

There is no mention of any such nick or break in the ship's logs, although any damage sustained by the ship, even of an unimportant nature, is entered therein as a matter of course.

The District Court found that the sheer strake had not sustained any exterior damage (Finding 51, at p. A 11), and this finding was concurred in by the Court of Appeals (at p. A. 23).

The hull fracture which was initiated in the sheer strake is amply explained by the latent defect therein found by Mr. Ibison. All of the experts, including Mr. MacCutcheon, called by petitioners, agreed that the fracture was due to a latent defect (Appx. 171a, 34a, 35a, 140a, 36a; T. M. pp. 710, 712, 161a, 162a).

There is no duty to use due diligence to look for a non-existent defect. *The Touraine,* L. R. [1928]. P. D. 58, at bottom of page 68.

Even under the Harter Act, the making of an inspection which would not have revealed any defect, is not required. *The Indrani,* 177 Fed. 914, C. C. A. 2. In that case, the Court said, p. 915:

> "A plain and satisfactory explanation of the break of the pipe on the voyage having been given, and there being uncontradicted testimony that the appearance of the break showed that it was sud-

> den and fresh and not the result of gradual deterioration, we cannot presume that, if an inspection had been made of the pipe before the voyage began, any indications of a coming break would have been discovered."

In the present instance, the fracture of the ship's hull has been logically and satisfactorily explained as being due to the presence of a latent defect which, as admitted by petitioners' counsel, see p. A. 12, could not have been ascertained by the use of due diligence.

Petitioners' suggestion that there was a nick or break in the sheer strake when the ship sailed from Yokohama is a mere figment of the imagination.

Even Mr. MacCutcheon, petitioners' expert, admitted that respondents' explanation of the cause of the casualty was correct (Appx. 161a-162a).

B. The asserted obligation to install crack arresters.

The subject of crack arresters is dealt with in Findings 41-45, at p. A-10, as follows:

> "41. Crack arresters do not prevent the occurrence of cracks in ships, nor do cracks always stop at an arrester.
>
> 42. By 1950 the United States had installed crack arresters in less than half of its completely welded vessels built during World War II.
>
> 43. The American Bureau of Shipping did not then and does not now require the installation of crack arresters in welded vessels which were built without them. Neither does it require crack arresters in new buildings.

44. The information as to welded ships which was gathered in the United States was communicated to those in Great Britain interested in the subject, including the Admiralty Ship Welding Committee and Lloyd's.

45. Lloyd's rules, up to the time of this disaster, did not require the owner of the 'Christer Salen' to fit her with crack arresters, nor did Lloyd's suggest that crack arresters be installed during the repair of the stranding damage in 1950".

Until their defeat in the District Court, petitioners' main, if not their sole, contention was that the "Christer Salen" was unseaworthy because crack arresters had not been installed. In dealing with this contention, Judge McGohey said: (at p. A12)

> "The libellants do not contend that the owners' failure to discover the defect in the starboard sheer strake plate constituted lack of due diligence. They contend rather that in light of the 'mass of data known to all those interested in shipping, long before 1950, establishing the dangers presented by a welded ship; * * * in the exercise of ordinary prudence, Lloyd's, as the vessel owners' agency which it employed to make the vessel seaworthy, should have required the installation of crack arresters when the vessel was being repaired at Gothenberg in 1950'; that Lloyd's was negligent in failing so to require and its negligence 'was lack of due diligence by the vessel owner.'
>
> These contentions are rejected."

The "Christer Salen" was completed in February 1945 and, at that time, the crack arrester was a wholly experimental device.

It was not until July, 1946 (Fdg. 40, at p. A9-10), that the Navy Board approved the installation of crack arresters in the poorly constructed ships, built as a part of the war program, and even then the approval was provisional and later withdrawn, since in 1950, *four years later*, out of 4712 welded steel merchant vessels built by the Maritime Commission, crack arresters had been installed in only 2000 (Fdg. 42, at p. A10). Most of these crack arresters were installed in the 2710 "Liberty" ships; nevertheless, many Liberties were not "strapped" (Appx. 151a). Crack arresters were *not* installed in the "C" type vessels which were of a size and type similar to the "Christer Salen" (Appx. 151a, 162a).

It has frequently been held that shipowners are not required to install every new invention or device under penalty of the ship's being held unseaworthy if they fail so to do.

Spang Chalfant & Co. v. *Dimon SS Corporation*, 57 F. 2d 965, C. C. A. 2;
The Cabo Hatteras, 5 F. Supp. 725, 736, S. D. N. Y.;
Virginia Carolina Chemical Co. v. *Norfolk & North American SS. Co.*, 17 Com. Cas. 277.

There is in fact no substantial disagreement between the U. S. Maritime Commission, the American Bureau of Shipping, the Admiralty Ship Welding Committee and Lloyd's Register of Shipping as to

the installation of crack arresters in ships already built.

The evidence shows that all four authorities agreed that crack arresters need not be fitted in dry cargo vessels of the better class.

Respondents were not required to go behind the certificate of Lloyd's Register and install a device which Lloyd's would have advised against.

In *Riverstone Meat Co.* v. *Lancashire Shipping Co.*, decided in the Queen's Bench Division in July 1958, reported in Vol. 3, Weekly Law Reports at p. 482, and in 1958 Lloyd's List Law Reports, Vol. 2, p. 255, where in a cargo damage case it was asserted that the ship's construction was improper despite the fact that she had been classified by Lloyd's for many years previous, the Court said, p. 497:

> "I accept and apply the observation of Mr. Justice Devlin in *Waddle* v. *Wallsend Shipping Company, Ltd.*, [1952] 2 Lloyd's Rep., at p. 130, that to require a shipowner to go behind the classification society's certificate would involve a retrogression beyond the point to which a reasonable shipowner can be expected to go."

SECOND POINT

The cases cited by the petitioners are all distinguishable.

In none of the decisions of this Court which are cited was the United States Carriage of Goods by Sea Act applicable, which, of course, differs widely from the Harter Act of 1893.

The Carriage of Goods by Sea Act, as is well known, enacts the Rules which were approved by the International Conference on Maritime Law, held at Brussels in 1922. These Rules have also been enacted in Great Britain and all her Dominions and Colonies, and in many European countries, as well as in the United States.

Petitioners cite *The Vallescura*, 293 U. S. 296, at pp. 9 and 10. In that case, the cargo had been damaged by two causes, for one of which the ship was liable and for the other of which the ship was not liable. This Court held that, under the facts of that case, the burden rested upon the ship to separate the two causes of damage.

The Isis, 290 U. S. 333, cited by petitioners, pp. 9 and 17, held that, in order to be entitled to the exemptions afforded by the Harter Act, the shipowner must prove that his ship was in all respects seaworthy, even if the alleged unseaworthiness had no connection with the loss. This is not the rule under the Carriage of Goods by Sea Act.

The Wildcroft, 201 U. S. 378, cited at page 10, is another Harter Act case, where this Court held that, under the Harter Act, a ship would not be presumed to be seaworthy.

At page 11, petitioners cite *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U. S. 104, where this Court held that, in the case of a so-called private carrier, the burden was on the cargo owners to prove unseaworthiness.

Any burden which may have rested on the respondents in the present instance has been fully sustained. Supra, pp. 9-13.

In *Nederlandsche etc. v. Mediterranean Traders Inc.*, 17 F. 2d 586, cited by petitioners at page 11, a Harter Act case, it was held that the burden imposed under the Harter Act had not been borne because the evidence was "wholly unsatisfactory" (p. 587).

The evidence in the case at bar was completely satisfactory, as shown by the findings of the District Court, and their affirmance by the Court of Appeals.

At page 12, petitioners cite another Harter Act case, *Loveland v. Bethlehem*, 33 F. 2d 655, where the Court said it was not sufficient to show a state of facts from which the Court could not discover how the disaster occurred.

Hudson River Shipyards Corp. v. Metropolitan Sand & Gravel Co., 104 F. 2d 167, C. C. A. 2, was a towage case not involving the carriage of goods by sea. The Court held that there was no obligation to make tests of the machinery of the tugs "not cus-

tomarily made," but that evidence should be offered as to whether the machinery was new or not and, if secondhand, its condition on purchase. The respondents fully complied with any obligations laid down by the Court in *Hudson River Shipyards* v. *Metropolitan Co., supra,* but, even if that were not the case, it would be entirely competent for the Court of Appeals for the Second Circuit to modify or even overrule its earlier decisions.

At page 14, petitioners cite among other cases *The Oritani*, 54 F. 2d 1075, C. C. A. 3, affirming on opinion below 40 F. 2d 522. In that case, the steamer "Oritani," soon after sailing from a West Indian port, stranded, causing serious cargo damage. It was the claim of the cargo that the stranding was due to a defective compass. The Court found that the compass was not defective and that the loss was due to an error in navigation for which there was no liability under the Act. That decision does not help the petitioners.

At page 16, petitioners cite *The Silverpalm,* 94 F. 2d 776, 9th Circuit, a collision case and, consequently, not pertinent as regards the Carriage of Goods by Sea Act. The ship's engines were so constructed that she could not reverse them promptly and this led to the collision. The master did not know of this peculiarity of the ship.

In *Standard Oil* v. *Clan Line,* 1924 A. C. 100, the ship was of the peculiar type known as a turret ship. The owners had been instructed by the shipbuilders that, if the ship were loaded with a homogeneous cargo, the ship's ballast must not be pumped out.

They did not notify the master of this information and, because of this failure on the owner's part, disaster resulted.

That case was not at all like the case at bar because it is well known to all masters and ship's officers that damage to a sheer strake, whether the hull be riveted or welded, creates a condition of danger. Under such circumstances, the difference, if any, between riveted and welded plates is immaterial. See *Louis-Dreyfus* v. *Paterson Steamships,* 67 F. 2d 331, C. C. A. 2.

States Steamship Co. v. *U. S.*, 259 F. 2d 458, C. A. 9, certiorari denied by this Court, January 12, 1959, cited by petitioners, p. 16, involved a disaster to a welded ship in which a crack arrester was fitted when she was built.

The ship involved, the "Pennsylvania", became a total loss with all hands while west-bound in the Gulf of Alaska in January, 1952. The "Pennsylvania" on a previous voyage had suffered a serious, 22-foot, crack in her deck, and this, the Court held, was a warning to her owners that under foreseeable conditions a second and more serious disaster was to be apprehended.

Until the accident of February 15, 1951, the "Christer Salen" had suffered no hull fracture and her steel was believed to be ductile and not brittle, A12.

The Court of Appeals considered the *Pennsylvania, supra*, clearly distinguishable from the case at bar, p. A22, and the denial of the petition for certiorari by this Court demonstrates that there is no conflict between the circuits.

The loss of the "*Pennsylvania*" demonstrates the futility of crack arresters to avert disaster.

Compania Generale v. *United States (The Elkton)*, 49 F. 2d 700, C. C. A. 2, cited by petitioners at p. 17; *The Fred E. Hasler*, 55 F. 2d 919, cited by petitioners at page 18; *Great Atlantic & Pac. Tea Co.* v. *Lloyd Brasileiro*, 159 F. 2d 661, cited at page 21, and *In re Spencer Kellogg*, 52 F. 2d 129, cited by petitioners at page 21, were all decisions in the Second Circuit. Without in any way admitting that there is anything in those decisions at all contrary to the result in the case at bar, it should be pointed out that it is clearly competent for the judges now sitting in the Court of Appeals for the Second Circuit to modify the conclusions of their predecessors, especially when interpreting a statute not passed on in the older cases.

With reference to the cases cited by petitioners on page 22, it is sufficient to say that, in *Hines* v. *Butler*, 278 F. 877, the shipowner was held entitled to limit his liability for loss of cargo by fire and that *Cornec* v. *Baltimore & O. R. Co.*, 48 F. 2d 497, was a suit by the shipowner to recover for loss by fire resulting from defective machinery used by the railroad company and no question of carrier's liability was involved.

LAST POINT

The petition for certiorari should be denied.

Dated, January 15, 1959.

Respectfully submitted,

JAMES McKOWN, JR.,
Attorney for Respondents,
80 Broad Street,
New York 4, N. Y.

WHARTON POOR,
CHARLES S. HAIGHT,
R. GLENN BAUER,
Counsel.